

SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

FILED

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APR 11 1988 ✓

CLERK, SUPREME COURT

By Chief Deputy Clerk *pl*

DAYRON CORPORATION and :
the CLAIMS CENTER, :
: Appellants, :
: vs. :
FRANK MOREHEAD, :
: Appellee. :
_____ :

CASE NO.:
DCA CASE NO.: BE-435
CLAIM NO.: 174 24 5147
D/A: 08/30/83

APPELLANTS' REPLY BRIEF TO THE FLORIDA SUPREME COURT

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PRELIMINARY STATEMENT

The Appellants, Dayron Corporation, and its Workers' Compensation servicing agent, the Claims Center, will be referred to as the Petitioners. The Appellee, Frank Morehead, will be referred to as the Respondent.

References to the Record on Appeal will be marked by the symbol (R) followed by the appropriate page number.

SUMMARY OF ARGUMENT

Florida Statutes Section 440.15(3)(a)(3) provides that in order to reduce litigation and establish more certainty and uniformity in the rating of permanent impairment, that permanent impairment shall (emphasis added) be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment. The First District Court of Appeal has further held that where specific tables for assessing impairment are set out in the AMA Guides, the applicable table must be used. In subsequent decisions, the First District Court of Appeal has noted that where injuries or conditions are not addressed by the AMA Guides, that permanent impairment ratings may be based upon other criteria.

The situation here presented to the Court is not one where the AMA Guide fails to address or cover the question of whether a permanent impairment is present. In fact, the AMA Guide addresses this issue, and specifically provides that the claimant's condition gives rise to a 0% permanent impairment. In the instant case, the First District Court of Appeal has substituted its judicial assessment of whether there is an impairment rating present, for the 0% impairment rating indicated by the legislatively mandated Guide.

ISSUE ON APPEAL

DO THE AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT APPLY AND PRECLUDE A PERMANENT IMPAIRMENT RATING WHERE CLAIMANT SUFFERS A DISABILITY DUE TO OCCUPATIONAL DISEASE WHICH PERMANENTLY IMPAIRS THE CLAIMANT'S ABILITY TO WORK, RESULTING IN ECONOMIC LOSS, BUT DOES NOT AFFECT "THE ACTIVITIES OF DAILY LIVING?"

ARGUMENT

DO THE AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT APPLY AND PRECLUDE A PERMANENT IMPAIRMENT RATING WHERE CLAIMANT SUFFERS A DISABILITY DUE TO OCCUPATIONAL DISEASE WHICH PERMANENTLY IMPAIRS THE CLAIMANT'S ABILITY TO WORK, RESULTING IN ECONOMIC LOSS, BUT DOES NOT AFFECT "THE ACTIVITIES OF DAILY LIVING?"

Counsel for the Respondent has correctly pointed out that Florida Statute Section 440.15(3)(a)(3) provides that:

In order to reduce litigation and establish more certainty and uniformity in the rating of permanent impairments, the Division shall establish and use a schedule for determining the existence and degree of permanent impairment based upon medically or scientifically demonstrable findings. The schedule shall be based on generally accepted medical standards for determining impairment and may incorporate all or part of any one or more generally accepted schedules used for such purpose, such as the American Medical Association Guide to the Evaluation of Permanent Impairment. On August 1, 1979, and pending the adoption, by rule, of a permanent schedule, the Guides to the Permanent Impairment, Copyright 1977, 1971, by the American Medical Association, shall be the (emphasis added) temporary schedule, and shall be used for purposes hereof. Florida Statutes Section 440.15(3)(a)(3) 1983.

Counsel for the Respondent has also correctly pointed out that the First District Court of Appeal has held that where specific tables for assessing impairment are set out in the Guides, the applicable table must be used, and it may not be combined with another table or subjective factor to produce a rating in excess of that provided by the AMA Guides Morrison & Knudsen/American v. Scott, 423 So.2d 463 (Fla. 1st DCA 1982).

The Petitioners do not dispute that the First District Court of Appeal has also provided, as pointed out in the Respondent's Brief, that permanent impairment can be based upon qualified expert testimony, and other guides, where certain injuries and conditions are not addressed by the AMA Guides Rhaney v. Dobbs House, Inc., 415 So.2d 1277 (Fla. 1st DCA 1982); Trindade v. Abbey Road Beef & Booze, 443 So.2d 1007 (Fla. 1st DCA 1983).

However, the situation here presented to the Court is not one where the AMA Guides do not address or cover the situation provided. Rather, the situation presented to the Court is one for which the AMA Guides specifically provide that there is no permanent impairment.

This Court has repeatedly held that permanent impairment may be established based upon generally accepted medical standards, but only where an injury is not covered by the AMA Guides Deseret Ranches v. Crosby, 461 So.2d 295 (Fla. 1st DCA 1985). The First District Court of Appeal has further noted that "application of a prescribed guide remains obligatory to the extent feasible." Martin County School Board v. McDaniel, 465 So.2d 1235, 1240, 1241 (Fla. 1st DCA 1984).

In the instant case, Example 3, page 205, AMA Guides to the Evaluation of Permanent Impairment, indicates that in situations such as here presented, no rating is contemplated by the AMA Guides. Example 3 provides specifically that where allergic contact dermatitis is present, which restricts the patient from employment in a specific industry where he would come in contact with the offending chemical, but where there is no limitation in the performance of activities of daily living, there is a 0% per-

manent impairment.

Counsel for the Respondent has argued in his Brief, in essence, that since the dermatitis condition restricts employment, there must accordingly be a permanent impairment. However, the First District Court of Appeal recognized in its decision in Walker v. New Fern Restorium, 409 So.2d 1201 (Fla. 1st DCA 1982) that an employee can qualify for rehabilitation benefits based upon restrictions on employment resulting from the industrial injury, without necessarily having a permanent impairment rating. The Respondent in the instant case has attempted to argue that restrictions on work activities necessarily equates to a permanent impairment rating. However, the First District Court of Appeal has clearly recognized in Walker v. New Fern Restorium, supra, that an industrial injury may result in restrictions on work activities such as to qualify the employee for rehabilitation assistance, yet not necessarily be accompanied by a permanent impairment rating.

So what.

CONCLUSION

The case law has clearly recognized that utilization of the AMA Guides to the Evaluation of Permanent Impairment is mandatory, where the AMA Guides cover the situation or injury presented. In the instant case, the AMA Guide clearly provides that contact dermatitis such as contracted by the claimant, while restricting the claimant's exposure to a particular chemical, does not result in a permanent impairment. The situation here presented to the Court is not one in which the AMA Guide does not cover the situation provided, but rather one in which the Guide does not assign an impairment rating. The First District Court of Appeal has substituted its judicial opinion regarding the existence of a rating, for use of the legislatively mandated Guide.

Respectfully submitted,



Robert G. Brightman, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Reply Brief to the Florida Supreme Court has been furnished by U.S. Mail to: Edward H. Hurt, Esquire, 1000 E. Robinson Street, Orlando, Florida 32801 and William J. McCabe, Esquire, P. O. Box 2226, Orlando, Florida 32802 this 9th day of April, 1986.



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